

July 30, 2015

Commissioner Gary Folger
5700 East Tudor Road
Anchorage, AK 99507

450 Whittier Street
PO Box 111200
Juneau, AK 99811

Re: Violence Against Women Act and tribal
protection orders
Our file: AN2013102606

Dear Commissioner Folger:

You have requested an opinion on how the Violence Against Women Act, 18 U.S.C. § 2265 (“VAWA”), affects state enforcement of domestic violence protection orders.¹ Specifically, you have asked whether VAWA requires the State of Alaska to enforce tribal protection orders that are not registered as required by Alaska law. Although your question refers to protection orders issued by Alaska tribes, the following analysis applies equally to protection orders issued by other states, territories, and non-Alaska tribes.²

VAWA expressly preempts state registration laws by requiring states to give full faith and credit to protection orders “notwithstanding failure to comply with any requirement that the order be registered or filed.”³ Thus, the State cannot condition

¹ VAWA uses the term “protection order,” while state statute refers to a “protective order.” Accordingly, this opinion uses “protective order” for State of Alaska orders, and “protection order” for all other orders.

² 18 U.S.C. § 2265(a) (requiring that full faith and credit be given to consistent protection orders “issued by the court of one State, Indian tribe, or territory”); 18 U.S.C. § 2266 (defining “State” as “a State of the United States, the District of Columbia, a commonwealth, territory, or possession of the United States”). Protection orders issued by other states and territories will be referred to as “foreign” orders.

³ 18 U.S.C. § 2265(d)(2); *see* discussion *infra* Section I.

enforcement of protection orders on prior registration. Further, VAWA requires a protection order to be enforced “as if it were the order of the enforcing State.”⁴ Because violations of state protective orders are enforced by arrest, that enforcement tool also must be available for violations of tribal and foreign protection orders.

This opinion also concludes that the Legislature should amend the conflicting state statutes to bring Alaska into compliance with VAWA, as most other state legislatures have done. But regardless of whether that occurs, the State must enforce unregistered tribal and foreign protection orders as though an Alaska court has issued them.

I. VAWA expressly preempts state statutes that require registration of protection orders before enforcement.

VAWA preempts the Alaska statutes that require registration of a protection order before the State can enforce it.⁵ The Supremacy Clause of the U.S. Constitution establishes federal law as “the supreme law of the land.”⁶ Accordingly, federal law can preempt state law and render a conflicting state provision void.⁷ Federal preemption is primarily a question of Congress’s intent.⁸ Congress’s preemptive intent can be inferred where an actual conflict exists between state and federal law.⁹ “Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute.”¹⁰ A conflict exists “where compliance with both federal and state regulations is a physical impossibility,” or where the state “law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹¹

⁴ See 18 U.S.C. § 2265(a); see discussion *infra* Section II.

⁵ See AS 18.66.140(b) (requiring protective orders from other jurisdictions to be registered in order to have same effect and be enforced in the same manner as Alaska orders); AS 11.56.740(a)(1) (criminalizing violations of protective orders “issued or filed” under state law).

⁶ U.S. Const. art. VI, cl. 2.

⁷ *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157 (1978).

⁸ See *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008) (explaining that intent to preempt state law can either appear in the express language of a federal statute or be inferred by a conflict between state and federal law).

⁹ *Id.*

¹⁰ *Ray*, 435 U.S. at 158.

¹¹ *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 540-41 (1977)) (internal quotation marks omitted).

No inference of preemptive intent is necessary here. In VAWA, Congress expressly stated that tribal and foreign protection orders must be enforced regardless of the enforcing state's registration requirements.¹² Under 18 U.S.C. § 2265(d)(2), “[a]ny protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed.”¹³ This express language aligns with a core purpose of VAWA, which is to ensure that dangerous individuals cannot evade a protection order simply by following the victim to a different jurisdiction.¹⁴ The clear and manifest purpose of VAWA is to require states to enforce a foreign protection order “as if it were the order of the enforcing State.”¹⁵

In Alaska, violating a protective order is a crime.¹⁶ Under the statute as currently written, the State can only prosecute violations of a tribal or foreign protection order if they have been “filed” (that is, registered) in state court.¹⁷ But because VAWA reflects express congressional intent to remove state registration requirements as barriers to enforcement,¹⁸ Alaska's statutes requiring registration of tribal and foreign protection orders before enforcement are void and without effect.¹⁹ Therefore, VAWA preempts the provision of AS 18.66.140(b) requiring that foreign and tribal protection orders be filed

¹² 18 U.S.C. § 2265(d)(2).

¹³ *See also* 18 U.S.C. § 2265(a) (providing that protection orders that are consistent with §2265(b) “shall be accorded full faith and credit”). While “full faith and credit” is not defined in VAWA, § 2265(a) suggests that it applies to both court process *and* law enforcement action. *Id.* (“[A] protection order . . . shall be accorded full faith and credit by the court . . . and enforced by . . . law enforcement personnel . . . as if it were the order of the enforcing State.”).

¹⁴ *The Violence Against Women Act of 1993*, S. Rep. 103-138, 1993 WL 355617, *62 (1993) (stating that the Senate Judiciary Committee included the full faith and credit provision as a “response to the problem of domestic violence which, because of their interstate nature, transcend the abilities of State law enforcement agencies”).

¹⁵ 18 U.S.C. § 2265(a).

¹⁶ AS 11.56.740.

¹⁷ *See* AS 11.56.740(a)(1) (defining crime of violating a protective order “issued or filed under AS 18.66”); AS 18.66.140(b) (giving filed foreign protective orders the “same effect” as Alaska orders, entitling them to “be enforced in the same manner” as Alaska orders).

¹⁸ 18 U.S.C. § 2265(d)(2).

¹⁹ *Altria Group, Inc.*, 555 U.S. at 76 (“[S]tate laws that conflict with federal law are without effect.” (internal quotation marks omitted)).

in state court, as well as the provision of AS 11.56.740(a)(1) requiring the filing of a foreign or tribal order as an element of the crime of violating a protective order.

II. Because VAWA requires the State to treat tribal and foreign protection orders the same as state protective orders, the State may also enforce those protection orders by arrest.

Although Congress expressly stated that VAWA preempts state law, it did not determine the scope of Congress's intended preemption.²⁰ VAWA states that a tribal or foreign protection order must be enforced "as if it were the order of the enforcing State."²¹ But did Congress intend enforcement to include *arrest*, thus preempting state criminal statutes that require registration before an officer may arrest for violating a protection order?²² In short, yes.

We interpret VAWA's mandate that the State enforce a tribal or foreign protection order as if it were a state order to mean that the same enforcement tools that are available for a state order—including arrest—must be available for tribal and foreign orders that otherwise meet VAWA's requirements.²³ In other words, officers may arrest an offender for violating a tribal or foreign protection order to the same extent that they can arrest an offender for violating a protective order issued under Alaska law.

This interpretation is supported by a guide issued by the National Center on Protection Orders and Full Faith and Credit.²⁴ This guide states that the issuing jurisdiction—the tribe or foreign jurisdiction—determines who is protected, the terms and conditions of the order, and how long the order is effective.²⁵ But the enforcing

²⁰ *Id.* ("If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains.").

²¹ 18 U.S.C. § 2265(a).

²² *See* AS 12.25.030(b)(2)(B) (authorizing warrantless arrest for committing crime of violating a protective order under AS 11.56.740); AS 18.65.530(a)(2) (authorizing mandatory arrest for crime of violating a protective order under AS 11.56.740(a)(1) or (2) within the previous 12 hours); AS 11.56.740(a)(1) (requiring that non-Alaska order be "filed under AS 18.66").

²³ *See* 18 U.S.C. § 2265(a); *Ray*, 435 U.S. at 158 (discussing inference of conflict preemption when state law is an obstacle to achieving Congress's full objectives).

²⁴ Nat'l Ctr. on Prot. Orders & Full Faith & Credit, *A Prosecutor's Guide to Full Faith and Credit for Protection Orders: Protecting Victims of Domestic Violence*, available at http://www.bwjp.org/assets/documents/pdfs/ffc_prosecutors_guide.pdf (last visited July 1, 2015).

²⁵ *Id.* at 6-7.

jurisdiction—here, the State of Alaska—determines how to enforce the order, including how to detain the offender, whether to notify a victim of release, the penalties for violation, and the responding officer’s arrest authority.²⁶

Therefore, before arresting an offender for violating the tribal or foreign protection order, a state officer must determine whether the arrest would be proper if the order had been issued instead by the State of Alaska. If the violation subjects the person to arrest, the officer must then also determine whether an arrest warrant is needed and whether arrest is mandatory.

A. When does Alaska law allow an officer to arrest for violation of a tribal or foreign protection orders?

Alaska law provides for the issuance of three types of protective orders: (1) domestic violence protective orders,²⁷ (2) protective orders for non-domestic violence stalking or sexual assault,²⁸ and (3) protective orders for a vulnerable person.²⁹ The type of order dictates whether arrest is mandatory or permissive.

To be enforceable by arrest, protective orders must include certain provisions.³⁰ For example, violating a domestic violence protective order is a crime only if the order contains “a provision listed in AS 18.66.100(c)(1)-(7),”³¹ such as a prohibition on

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Id.

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AS 18.66.100-.110; AS 11.56.740(a)(1).

²⁸

AS 18.65.850-.860; AS 11.56.740(a)(2).

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AS 13.26.207-.209; AS 11.56.740(a)(3). It is a state crime to violate a provision of a vulnerable person protective order (such as protecting elders from fraud). AS 11.56.740(a)(3) (defining crime of violating a protective order issued under AS 13.26.207-.209). A tribal or foreign vulnerable person protection order (with a prohibition on contact) would fall under VAWA’s definition of a protection order when the court seeks to protect the vulnerable person from “violent or threatening acts, harassment, sexual violence, contact, communication, or physical proximity to another person.” 18 U.S.C. § 2266(5)(A). However, other vulnerable person protection orders (like those intended to protect against financial overreach or fraud) would fall outside of VAWA’s definition of a protection order and would not be entitled to full faith and credit under VAWA. *See id.*

³⁰

See AS 11.56.740 (defining crime of violating a protective order); AS 12.25.030(b)(2)(B) (discussing discretionary arrest); AS 18.65.530(a)(2) (requiring mandatory arrest for violation of protection orders within previous 12 hours).

³¹

AS 11.56.740(a)(1); *see* AS 18.66.100(c)(1)-(7) (generally allowing domestic violence protective orders to prohibit threats of domestic violence, stalking, or harassment; to prohibit contact/communication; to “remove and exclude the respondent”

telephoning or otherwise contacting the petitioner. Similarly, violations of non-domestic violence stalking or sexual assault orders satisfy the elements of the crime only if those orders contain a provision listed in AS 18.65.850(c)(1)-(3), such as the requirement to stay away from the petitioner's residence or place of employment.³² Most tribal or foreign orders issued with the intent that they be enforced under VAWA will have language similar, but not necessarily identical, to these state provisions, because by definition VAWA protection orders are meant to prevent violent or threatening acts, harassment, sexual violence, contact or communication, or proximity to another person.³³ Accordingly, if the tribal or foreign order language clearly intends to cover conduct that is found in the relevant state statute provisions,³⁴ the fact that it is not identical to those provisions will not stand in the way of the order being enforceable by arrest.³⁵

B. Is a warrant needed to arrest?

An officer may arrest for a violation of an Alaska protective order (as the crime is defined in AS 11.56.740) without a warrant.³⁶

from the petitioner's residence; to "direct the respondent to stay away from . . . any specified place"; to prohibit entry into a vehicle possessed or occupied by the petitioner; to "prohibit the respondent from using or possessing a deadly weapon" where one was used during domestic violence; to direct surrender of any firearm).

³² AS 11.56.740(a)(2); AS 18.65.850(c)(1)-(3) (stating that these types of orders may prohibit the respondent from committing or threatening to commit stalking or sexual assault, from contacting the petitioner or a named household member, and may "direct the respondent to stay away from . . . any specified place frequented by the petitioner").

³³ Compare 18 U.S.C. § 2266(5)(A) (stating purposes of VAWA protection orders), with AS 18.66.100(c)(1)-(7) (setting out similar purposes for state domestic violence protective orders). VAWA protection orders may also have a "support, child custody or visitation provision," but those provisions have to be issued in the context of an order "for the protection of victims of domestic violence, sexual assault, dating violence, or stalking." 18 U.S.C. § 2266(5)(B).

³⁴ AS 11.56.740(a)(1) (defining crime of violating a protective order to include orders that "contai[n] a provision listed in AS 18.66.100(c)(1)-(7)"); AS 18.66.100(c)(1)-(7).

³⁵ See 18 U.S.C. § 2265(a) (stating VAWA's overarching directive for states to enforce a tribal or foreign protection order "as if it were the order of the enforcing State"). Of course, an officer who otherwise has probable cause to arrest the violator should do so. See AS 12.25.030(a)(1)-(3), (b)(2)(A), (b)(2)(C), (b)(3) (defining alternative grounds for warrantless arrests).

³⁶ AS 12.25.030(b)(2)(B); AS 18.65.530(a).

Because tribal and foreign VAWA protection orders must be enforced as state protective orders, if the offender's actions otherwise meet the requirements of the state crime of violating a protection order, then officers may also arrest that offender without a warrant.³⁷ This interpretation is consistent with Alaska's statutory mandate to "use every reasonable means to enforce a protective order."³⁸

C. Is arrest mandatory?

Arrest for violation of a protective order is mandatory under certain circumstances. If an officer has probable cause to believe that an offender has violated a domestic violence protective order or a non-domestic violence stalking or sexual assault protective order within the previous twelve hours, the officer must arrest the offender for violating that order, with or without a warrant.³⁹ Because tribal and foreign protection orders must be enforced as state protective orders, the same mandatory arrest requirements apply as long as the elements of the underlying crime of violating a domestic violence protective order are met.

III. VAWA requires the State to enforce only protection orders issued by a court with jurisdiction that provided due process to the respondent.

VAWA requires the State to enforce only tribal and foreign protection orders that are "consistent" with VAWA.⁴⁰ An order is consistent with VAWA if the issuing "court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory," and "reasonable notice and opportunity to be heard is given" to the offender "sufficient to protect that person's right to due process."⁴¹ Because only consistent orders are entitled to full faith and credit, the State may review a tribal order for jurisdiction and due process before giving it full faith and credit.⁴²

³⁷ 18 U.S.C. § 2265; AS 11.56.740; AS 12.25.030(b)(2)(B); AS 18.65.530(a).

³⁸ AS 18.66.170.

³⁹ AS 12.25.030(b)(1) (stating that officers "shall arrest under the circumstances described in AS 18.65.530"); AS 18.65.530(a)(2) (requiring arrest if crime of violating a protective order under AS 11.56.740(a)(1) or (2) was committed in the last 12 hours). Officers are excepted from the mandatory arrest requirement if they receive authorization not to arrest from a prosecuting attorney. AS 18.65.530(c).

⁴⁰ 18 U.S.C. § 2265(a); 18 U.S.C. § 2265(b).

⁴¹ 18 U.S.C. § 2265(b) (also allowing special provisions for ex parte orders).

⁴² See Letter from Tony West, Assoc. Att'y Gen., U.S. Dep't of Justice, to Michael C. Geraghty, Att'y Gen., State of Alaska 2 (July 28, 2014) (stating that "so long as a protection order meets the other requirements of Section 2265 . . . , prior registration or filing in the state jurisdiction is not a prerequisite for state enforcement.").

A. A tribe must have jurisdiction to issue protection orders under federal and tribal law.

VAWA expressly defines a tribe's subject-matter jurisdiction to issue protection orders. VAWA § 2265(e) states, in pertinent part, that tribes have "jurisdiction to issue . . . protection orders involving any person . . . in matters . . . otherwise within the authority of the Indian tribe."⁴³ Federal law determines what matters are within the authority of a tribe.⁴⁴ Tribes have jurisdiction either because Congress has expressly delegated it or because the tribes have inherent jurisdiction.⁴⁵ VAWA § 2265(b) defines "consistent" orders that are entitled to full faith and credit, in relevant part, as orders issued when the tribal court has jurisdiction "under the law of such . . . Indian tribe."⁴⁶

Reading VAWA subsections 2265(e) and (b) in harmony, VAWA indicates that the tribe must have subject-matter and personal jurisdiction under federal law *and* under the tribe's own laws. The precise bounds of tribal jurisdiction in this area will likely be developed through case law.

⁴³ 18 U.S.C.A. § 2265(e).

⁴⁴ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324, 327-41 (2008) (holding that extent of tribal court adjudicative jurisdiction is a federal question, determined by congressional delegation and inherent jurisdiction, and that "tribal jurisdiction. . .generally does not extend to nonmembers" except if conduct meets the *Montana* exceptions). The *Montana* exceptions are (1) when a nonmember engages in a consensual business relationship with tribe, or (2) when the nonmember's conduct threatens or has a "catastrophic" direct effect on the political integrity, economic security, or health or welfare of the tribe itself. *Id.* at 329-30, 341 (applying *Montana v. United States*, 450 U.S. 544, 557-63 (1981)).

⁴⁵ *See Montana*, 450 U.S. at 557-63 (examining statutes and treaties for evidence that Congress intended to delegate authority to the tribe); *id.* at 563-66 (examining whether the tribe had inherent regulatory authority as a matter of self-government or to control internal relations); *id.* at 564 (providing that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"); *id.* (noting tribes retained inherent jurisdiction over tribal membership, regulation of domestic relations among members, and rules of inheritance for members).

⁴⁶ 18 U.S.C. § 2265(b) (requiring the court to have "jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory").

B. The tribe must provide the respondent reasonable notice and opportunity to be heard.

For a protection order to be “consistent” under VAWA, the tribe must give the respondent “reasonable notice and opportunity to be heard” in a manner sufficient to protect the respondent’s due process rights.⁴⁷ If this issue is ever litigated with respect to a tribal protection order, the court would likely look to federal constitutional law for the minimum due process to which a person would be entitled.⁴⁸ Notably, the Alaska Supreme Court has indicated that it does not consider the requirement to provide minimum due process to mean that tribal courts must use the same procedures as state or federal courts.⁴⁹ Whether specific tribal procedures for issuing protection orders meet minimum due process will likely be determined by case law.

IV. Orders not labeled as “protection orders” may be enforceable under VAWA, but only to the extent that those orders contain provisions consistent with VAWA’s definition of a protection order.

Tribal and foreign courts can best protect victims by clearly labeling a VAWA protection order as a “protection order.” Nonetheless, provisions of a tribal or foreign order that is not labeled as a “protection order” may still be enforceable under VAWA. Under VAWA, a “protection order” includes any order issued “for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person” or “for the protection of

⁴⁷ *Id.* at § 2265(b)(2). For ex parte orders, “notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights.” *Id.*

⁴⁸ *See Starr v. George*, 175 P.3d 50, 57-58 (Alaska 2008) (citing *Aguchak v. Montgomery Ward Co.*, 520 P.2d 1352, 1356 (Alaska 1974) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)) (in applying standard for full faith and credit under the Indian Child Welfare Act—which required the state to give the same credit to tribal court judgments that it gives to judgments of other states—the court adopted the *Mullane* federal constitution due process standard for determining whether the tribal order was issued with constitutionally effective notice under the Alaska Constitution).

⁴⁹ *See John v. Baker*, 982 P.2d 738, 763 (Alaska 1999). The Court also cautioned that the due process analysis “is not an invitation for our courts to deny recognition to tribal judgments based on paternalistic notions of proper procedure” and emphasized that “courts should strive to respect the cultural differences that influence tribal jurisprudence, as well as to recognize the practical limits experienced by small court systems.” *Id.* (analyzing comity rather than full faith and credit).

victims of domestic violence, sexual assault, dating violence, or stalking.”⁵⁰ Therefore, even if the tribe or foreign order is labeled as a different type of order, the State should enforce the provisions in that order that meet these purposes in accordance with the guidelines discussed in Sections I-III of this opinion. Similarly, even where an order is labeled “protection order,” any term in that order that does not qualify under VAWA’s definition of a protection order would not be entitled to enforcement under VAWA.⁵¹ It is the substance and not the title that matters.

For example, tribal and foreign protection orders can include provisions relating to child custody,⁵² but not all tribal child custody orders are enforceable protection orders under VAWA. To qualify as a VAWA protection order, a child custody order must have been issued “for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.”⁵³ A provision of a child custody order would meet the VAWA criteria and be immediately enforceable if, for example, it indicated that a child was removed from a parent’s custody because of domestic violence or sexual abuse, and the order enjoined the parent from contact with the child. Other provisions in the order may not be entitled to enforcement under VAWA. Of course, the State will enforce tribal child custody orders that do not meet VAWA’s stated purpose in accordance with ICWA and the Alaska Supreme Court’s Child in Need of Aid rules governing enforcement of tribal court child custody orders.⁵⁴ In sum, the title of an order does not dictate how the State should respond when presented with it.

⁵⁰ 18 U.S.C. § 2266(5)(A), (B).

⁵¹ See 18 U.S.C. § 2266(5) (defining protection order). For example, an order preventing a person’s contact with another person for dealing drugs does not fit VAWA’s requirement of protecting victims of domestic violence, sexual assault, dating violence, or stalking.

⁵² 18 U.S.C. § 2265(5)(B) (defining protection order to include “any support, child custody or visitation provisions” in a tribal order “for the protection of victims of domestic violence, sexual assault, dating violence, or stalking”).

⁵³ *Id.*; see also 18 U.S.C. § 2266(5)(A) (defining “protection order” as including orders issued “for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person”).

⁵⁴ See 25 U.S.C. § 1911(d) (providing for full faith and credit to judicial proceedings in ICWA child custody proceedings); 25 U.S.C. § 1903(1) (defining child custody proceeding); Child in Need of Aid Rules 24 and 25 (describing registration, confirmation, and enforcement of tribal court orders entered in child custody proceedings as defined in ICWA).

V. The State encourages registration of tribal and foreign protection orders.

Although the State must enforce unregistered orders, registering orders with the Alaska court system has benefits. For example, registration allows protection orders to be entered into the State's central registry. The registry gives officers access to tribal and foreign protection orders anywhere in Alaska, even if the victim does not have a copy of the order at hand. While not required for enforcement, registration of tribal and foreign protection orders helps officers to protect and serve the public.

VI. Conclusion.

Based on this opinion, the State should not enforce or apply the provisions of state law that conflict with VAWA, and should investigate and prosecute violations of tribal and foreign protection orders that meet the full faith and credit requirements set forth in VAWA. In addition, Alaska should resolve the conflict between its statutes and VAWA with legislative amendments that bring Alaska's statutes into compliance with federal law.

Sincerely,

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